KIM THYE CO.

v.

KETUA PENGARAH JABATAN HASIL DALAM NEGERI, KUALA LUMPUR

HIGH COURT MALAYA, MUAR
RICHARD TALALLA J
[ORIGINATING MOTION NO. 32-17 OF 1987]
2 SEPTEMBER 1991

REVENUE LAW: *Penalty imposed for furnishing incorrect returns of information - Whether intention to mislead and evade payment of timber profits tax - Whether appeal lies to the Special Commissioners of Tax - Whether penalty is "assessment" - Whether Director-General obliged to consider good faith or amount of penalty - Federal Constitution, Pt. II, Article 13(1) - Income Tax Act 1967, ss. 2, 93, 96, 99(1), 113(1), (2), 124(3), 125(2), 152(1), Form JA - Supplementary Income Tax Act 1967.*

The respondent contended that the applicant had given him incorrect, insufficient and misleading information in order to evade payment of timber profits tax. The applicant, however, claimed that there had been a technical and *bona fide* error and that there was no intention to mislead the respondent. The respondent imposed a penalty on the applicant and the applicant objected to it, requesting on 13 August 1984 that payment be stood over pending the decision of the Special Commissioners of Tax. On 23 May 1987, the respondent informed the applicant that their appeal had been rejected and required payment of the penalty.

The applicant applied for an order of *certiorari* to quash the respondent's decision, and in the alternative an order of *mandamus* directing the respondent to refer the appeal to the Commissioners.

The respondent said that it had not forwarded the applicant's appeal to the Special Commissioners because there was no right of appeal to them under s. 113(2) of the Income Tax Act 1967 (the Act) against imposition of a penalty, and therefore contended that *mandamus* would not lie. The respondent admitted that although *certiorari* could lie, in the circumstances of this case, *certiorari* should not issue.

Held:

[1] Whether the applicant had a right of appeal against the imposition of penalty depends on whether the penalty can be considered to be an assessment within the meaning of the law. The penalty in the instant case was imposed under s. 113(2) of the Act; it was a punishment imposed for misconduct for furnishing incorrect returns or information.

[2] It is a basic rule of interpretation that words in a statute must be considered as a whole and in context. There is a general rule in favour of the strict construction of a penal statute. In the event of any doubt or ambiguity, the statute must be construed in favour of the person subjected to the penalty. Section 113 of the Act is penal in nature.

[3] Sub-section 1 of s. 113 is couched in mandatory terms but is conditioned, whereas subsection 2 is expressed in terms which are discretionary. Although the Director General may require payment of the penalty, he is not bound to do so. He is given a discretion which he cannot exercise at whim or fancy but after due consideration of all relevant facts and circumstances. The Director General would have to consider whether the incorrect return or incorrect information was made or given dishonestly with intention to evade payment of

tax or possibly even negligently and only then, mete out the punishment which under subsection 2 is a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information.

[4] Under s. 124(3) the Director General is again clothed with a discretion to abate or remit the penalty and again in this respect he must consider all the said facts and circumstances and thereafter determine a sum which he considers fair and proper to impose, by way of penalty, and in doing so, he will in truth and effect be making an assessment.

[5] The word "assessment" being expressly defined in the Act as "any assessment or additional assessment made under this Act", it has to follow that in the absence of anything pointing to the contrary the meaning of the word "assessment" in s. 99 is that expressly given to it in s. 2.

[6] Tax and penalty are distinct entities. Assessment is necessarily a prerequisite to tax and penalty.

[7] Section 99(1) provides that a person aggrieved by an assessment can appeal to the Special Commissioners against the assessment. Before a penalty can be imposed, the amount has to be assessed. Against that assessment, a person aggrieved has a right of appeal to the Special Commissioners.

[Respondent's decision not to refer applicant's appeal to the Special Commissioners quashed; respondent ordered to refer appeal to Special Commissioners]

Cases referred to:
A.B.C. v. The Comptroller of Income Tax, Singapore [1959] 25 MLJ 162 ***(cons)***
Attorney-General v. Till [1910] AC 50 ***(cons)***
Government of Malaysia v. Preston Corp. (M) Sdn. Bhd. [1982] CLJ (Rep) 453 ***(foll)***

Legislation referred to:
Income Tax Act 1967, ss. 2(1), 93, 96, 98(3), 99(1), 103-106, 107A(1), 112(3), 113(2), 124(3), 125(2), 152(1)

Other source referred to:
Shorter Oxford English Dictionary, 3rd Edn., Revised with Addenda

For the applicant - K.S. Dass; M/s. K. Sila Dass & Partners
For the respondent - Zaleha Zahari, SFC

JUDGMENT

Richard Talalla J:

The Supplementary Income Tax Act 1967 provided for a supplementary income tax (to be known as timber profits tax) to be charged upon the income, of any person including a partnership enjoying taxable timber profit, derived from timber operations defined in that Act.

For several years the applicant traded in timber logs under a licence granted to it by the Forest Department in such a manner as not to attract timber profits tax. In 1978 the applicants changed their operations in such a way that the income they derived did attract timber profits tax. However they continued to submit their income tax returns in the same manner as they had done before the change, lumping their source of income under a heading namely "purchase of logs" resulting in the applicants not being assessed for timber profit. The respondent subsequently came to know the true position, duly assessed the applicant who then paid the timber profits tax. The applicant has not appealed against that assessment.

The respondent was of the view that the applicant had given the respondent incorrect, insufficient and misleading information and had clearly intended to evade the payment of timber profits tax. The applicant on the other hand claimed that there had been a technical and *bona fide* error and that there was no intention to mislead the respondent.

The respondent having taken that view imposed on the applicant a penalty pursuant to the provisions of s. 113(2) of the Income Tax Act 1967 (the Act).

By letter dated 13 August 1984 from the applicant's tax consultant and accountants Messrs P.C. Tan & Associates to the respondent, the applicant objected to the imposition of the penalty on a number of stated grounds and requested that payment thereof be stood over pending the decision of the Special Commissioners (the Commissioners). By letter dated 26 August 1984 from the respondent to the said accountants the respondent stated that he was for the time being standing over the penalty, made certain requirements and stipulated a certain time within which those requirements were to be received by the respondent's department in order to expedite the outstanding appeal. By letter dated 23 May 1987 the respondent informed the said accountants that the applicant's appeal had been rejected and requiring payment of penalty.

The applicant applied to this Court for an order of *certiorari* to remove into this Court and quash the respondent's decision dismissing the applicant's appeal against the imposition of the penalty and in the alternative an order of *mandamus* directing the respondent to refer the appeal to the Commissioners.

The grounds upon which the plaintiff's application was made are as follows:

1. The respondent was wrong in law in imposing the penalty because there was no evidence that the applicant made an incorrect return, gave incorrect information but had acted in good faith and made full disclosure.
2. The penalty could only be invoked against the person as defined in s. 2 of the Act and not against the partnership which the applicant is.
3. The applicant having appealed to the Commissioners, its appeal had not been referred to them.
4. The respondent being vested with a discretion in imposing the penalty, had not exercised that discretion consistently with the facts and circumstances and had imposed the same unjustly and inequitably.

The respondent in answer to the application admitted that the applicant had filed notice of appeal against imposition of the penalty and that the respondent had not forwarded the appeal to the Commissioners. The respondent contended that he was right in law in not forwarding the appeal to the Commissioners because there is no right of appeal to them against imposition of a penalty under s. 113(2) of the Act and accordingly *mandamus* does not lie. The respondent accepted as a matter of law that *certiorari* lies in a fit and proper case even against the decision of the respondent but submitted that in the circumstances of this case, *certiorari* should not issue.

Section 113(2) of the Act reads as follows:

> Where a person:
>
> (a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,

then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct; and, if that person pays that penalty (or, where the penalty is abated or remitted under s. 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1).

Section 99(1) of the Act reads as follows:

A person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment by giving to the Director General within thirty days after the service of the notice of assessment or, in the case of an appeal against an assessment made under s. 92, within the first three months of the year of assessment for which the assessment was made (or within such extended period as regards those days or months as may be allowed under s. 100) a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form.

Whether the applicant has a right of appeal to the Commissioners against imposition of the penalty depends on whether the penalty can be considered to be an assessment within the meaning of s. 99(1).

In s. 2(1) of the Act "assessment" means any assessment or additional assessment made under this Act. In *A.B.C. v. The Comptroller of Income Tax, Singapore* [1959] 25 MLJ 162 at p. 165 Buttrose J commented as follows:

As was stated by Issacs J in *The King v. The Deputy Federal Commissioner of Taxation for South Australia; ex parte Hooper*:

An assessment is not a piece of paper: it is an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a notification thereof called 'a notice of assessment'. But neither the paper sent nor the notification it gives is the 'assessment'. That is and remains the act or operation of the Commissioner.

The assessment itself is the administrative act of the Comptroller and determines the quantum of the tax and as was stated by Mr. Hill it involves a mathematical calculation and the exercise of judgment. See *Gamini Bus Co. v. Commissioner of Income Tax (Colombo).*

Senior Federal Counsel argued by reference to the case last referred to that an assessment is necessarily confined to the assessment of tax and not a penalty, that in determining tax the chargeable income had to be ascertained as provided in Part III of the Act, then the relevant tax rates had to be applied and thus a figure arrived at which would be the tax chargeable whereas nothing of that sort is done in imposing a penalty.

The penalty in this case, as abovestated, was imposed under s. 113(2) of the Act. It was a punishment imposed for misconduct in furnishing incorrect returns or information.

It was submitted that I should make a comparison of the two subsections of s. 113. It was pointed out that subsection 1 provides for the Court to give consideration to the question whether an incorrect return or incorrect information was made or given in good faith whereas

in subsection 2 there is no such provision. Hence, so the argument went, the Director General when acting under the latter subsection and requiring a person to pay a penalty is not obliged to give consideration to any question of good faith and consequently is likewise not obliged to assess the amount of the penalty before imposing the same.

Section 99(1) falls within Part VI of the Act. That part which bears the heading assessment and appeals consists of two chapters, the first one entitled assessments and the other appeals. It was argued on behalf of the respondent that the word assessment in s. 99 must necessarily be confined to an assessment of the kind referred in the sections in the first chapter to wit an assessment of tax, seeing that those sections with s. 99 all come under the same part of the Act namely Part VI.

It is basic to the interpretation of a statute that the intention of Parliament as expressed in the legislation be ascertained. Primarily the actual words used in the Act must be considered and they need to be read as a whole and in context. If the words are plain and unambiguous they will be applied.

There is a general rule in favour of the strict construction of a penal statute. This simply means that if after the basic rule of interpretation is applied, doubt or ambiguity remains, the legislation is to be construed in favour of the person subjected to the penalty. Section 113 of the Act is of course penal in nature.

As I see it subsection 1 of s. 113 is couched in mandatory terms but conditioned whereas subs. 2 is expressed in terms which are discretionary. The Director General may require payment of the penalty. He is not bound to require such payment. He is given a discretion, a discretion which to my mind he cannot exercise at whim or fancy but after due consideration of all relevant facts and circumstances. It seems to me that the Director General would have to consider whether the incorrect return or incorrect information was respectively made or given dishonestly with intention to evade payment of tax or possibly even negligently and then, and only then, mete out the punishment which under subsection 2 is a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information and so on. But that is not all. Under s. 124(3) the Director General is again clothed with a discretion to abate or remit the penalty and again in this respect he must likewise act. It can therefore be said, and I do so hold, that the Director General in considering all the said facts and circumstances and thereafter determining a sum which he considers fair and proper to impose, by way of penalty, is in truth and effect making an assessment. In the *Shorter Oxford English Dictionary*, 3rd Edn., Revised with Addenda, the word "assess" is said to mean:

1. To fix the amount of (taxation, fine, etc) to be paid by a person or community.
2. To determine the amount of and impose upon.
3. To impose a fine or tax upon; to tax, fine. Const. in, at the amount. Also fig.
4. To estimate officially the value of (property or income) for taxation.

Part II of the Constitution provides for the protection of fundamental liberties of the subject. It is stated in art. 13(1) that no person shall be deprived of property save in accordance with law. It is fully realised that the payment of income tax is an obligation which no person liable to pay the same should be allowed to evade without exposure to penalty. As stated by Lord Loreburn LC in *Attorney-General v. Till* [1910] AC 50 at p. 53, admittedly in regard to the English Income Tax Act 1842:

> The Act appears to have been formed in full view of the conditions under which the income tax has to be collected. On the one hand hundreds of thousands, if not millions, of people are required to make returns. It is necessary, therefore, that there should be a sharp weapon available in order to prevent the requirements of the Act being trifled with. On the other hand the making of the return or statement is not always easy, and mistakes may occur notwithstanding that care may have been used to avoid them, still more when proper care has not been used. Accordingly provision is made for penalties which are to fall in the event either of unpunctuality or of inaccuracy in the return or statement required.

Nonetheless the fundamental liberties guaranteed by the Constitution are sacrosanct. Ours is a democracy, not an autocracy.

The word "assessment" being expressly defined in the Act as "any assessment or additional assessment made under this Act", it has to follow that in the absence of anything pointing to the contrary the meaning of the word "assessment" in s. 99 is that expressly given to it in s. 2. I could find no basis for restricting its meaning to assessment of tax as suggested.

I am with respect in agreement with the *dictum* of Wan Hamzah J as he then was, in *Government of Malaysia v. Preston Corp. (M) Sdn. Bhd.* [1982] CLJ (Rep) 453 where his Lordship said at p. 456:

> It should be noted that s. 99(1) refers to "assessment" generally, and not specifically to "assessment of tax". The question may be asked whether the Director-General in fact "made an assessment" when he imposed the penalty. In my opinion there should not be any doubt as to this. The notices which were served on the defendant giving notification of the imposition of the penalty were notices of assessment in Form JA which is a form prescribed under s. 152 of the Act. The prescribed form contains a column for penalty imposed under s. 113(2). Therefore the imposition of the penalty is an assessment, and the assessment of penalty is subject to appeal to the Special Commissioners under s. 99(1). So, in order to contest against the penalty the defendant should lodge an appeal to the Special Commissioners.

Form JA is of course a form prescribed by the Director General under s. 152(1) and as stated by Wan Hamzah J has a column for the penalty imposed under s. 113(2), the amount whereof would have been duly assessed before imposition. The form itself appears to have been designed to fit into the scheme created by ss. 93, 96 and 99(1) of the Act and thus making the assessment of the penalty by a person aggrieved thereby appealable to the Special Commissioners.

Senior Federal Counsel mounted an argument calling in aid s. 125(2) of the Act. This section comes under Part VIII of the Act and that part is entitled "Offences and Penalties". The subsection provides that a penalty imposed on any person under ss. 112(3) or 113(2) shall be collected as if it were part of the tax payable by that person, but shall not be treated as tax so payable for the purposes of any provision of this Act other than ss. 103 to 106. As to the sections last referred to s. 103 is in respect of payment of tax and the remaining sections relate to recovery of the same. Counsel argued that when an assessment is made tax is ascertained but when a penalty is imposed tax is not ascertained. Counsel added that a penalty is not tax. With respect, I do not see the logic of the argument. That tax and penalty are distinct entities there is no doubt. That is beside the point. It is trite that when a penalty is imposed tax is not ascertained. To my mind the real question is whether tax and penalty are both necessarily born out of an assessment; whether an assessment is perforce a prerequisite to tax and penalty. As I see it in both instances assessment is necessarily a prerequisite.

Senior Federal Counsel in pursuing the argument sought support from the decision of George J in Kuala Lumpur High Court Originating Summons No. C178 of 1984 *Korea Dvpt. Corp. v. Government of Malaysia and Director-General of Inland Revenue*. In that case the plaintiff, a non-resident contractor, had received full payment under a contract between the plaintiff and the government. Section 107A(1) of the Act requires the government as payer upon paying or crediting such contract payment to make a deduction from that contract payment at the rate of certain prescribed percentages of the same. The government having made full payment then requested payment of the tax which should have been deducted in the first place. The plaintiff applied in the said originating summons for an order declaring that the contract payment was not subject to such deduction. The grounds of that application were not stated. The defendants then applied for an order that the originating summons be struck out *inter alia* on the grounds that the plaintiff's remedy was by way of appeal to the Special Commissioners. The learned Judge held that s. 107A provides a method of collection of tax which may or may not have been assessed and that the Special Commissioners did not have jurisdiction to entertain any appeal or complaint in respect of matters or questions that arise from or in respect of the collection and recovery of tax and accordingly dismissed the defendants' application. I fail to see how that decision has any application in this case. On the face of the judgment no question of assessment of tax or penalty was involved.

Senior Federal Counsel researched corresponding legislation in England, Canada, Australia and India and submitted that all those countries enjoyed legislation providing expressly for appeal against the imposition of a penalty. That may well be so. This Court however is only concerned with our own legislation. To my mind that legislation is clear in its terms. As stated above s. 99(1) provides for a person aggrieved by an assessment made in respect of him to appeal to the Special Commissioners against the assessment. Before a penalty can be imposed the amount thereof has to be assessed. Against that assessment a person aggrieved thereby has a right of appeal to the Special Commissioners.

It is not surprising that appeal against the imposition of a penalty should lie to the Commissioners who by virtue of s. 98(3) and para. 1 of Schedule 5 shall include at least one person with judicial or other legal experience. Thus not only are they qualified to deal with the assessment generally but the person among them with such experience would also be present to advise on matters and the law relative to dishonesty and intention to evade payment of tax or, if applicable, negligence.

Accordingly I am of the view that an order should be issued quashing the decision of the respondent not to refer the applicant's appeal against the imposition of the penalty to the Special Commissioners and there should be a further order directing him so to do. I so order.

It should be noted that the respondent accepted as a matter of law that the respondent was not immune from the process of judicial review and made no procedural objection, arguing only that on the facts of this case *certiorari* and *mandamus* should not lie.

Also found at [1991] 3 CLJ 2507